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SUPREME COURT, U.S.

No. 07-1415

IN THE

Supreme Court of the United States

JAMAR L. CAMPBELL,

Petitioner,

vs.

PERRY PHELPS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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ARGUMENT IN REPLY

The petition demonstrated a clear, intolerable, and irreconcilable conflict among the circuit courts on a question of federal law. Under the holdings of five courts of appeals (spanning 28 states), a state procedural ruling is "dependent" upon federal law when a state court reviews the merits of an otherwise waived federal claim under a "plain-error" exception to a waiver rule. Under the holdings of six other circuit courts of appeals, spanning the remaining 22 states, a state procedural ruling is "independent" of federal law when a state court reviews an otherwise waived federal claim on the merits under a "plain error" exception to a waiver rule.

The petition also demonstrated that the clear conflict among the circuits may be the result of competing principles in this Court's decisions, which, arguably, have been misapplied by some courts of appeals.

Respondent concedes the split and does not even address its consequences. Opposition at 9. Nevertheless, aside from arguing extensively about the merits of the Third Circuit's decision, the Respondent claims that review of the question presented "is not warranted at this time" because the split "is better explained by the varying scope of plain error review among the states (or the particular scope of the plain error analysis by the state court), not by the existence of an irreconcilable split among the courts of appeals." *Id.*

Respondent's argument misses the mark.

1. Although Respondent claims the split is not as "clear" as Petitioner suggests, a comparison of the cases he cites for this proposition underscores the clear conflict among the circuits. In *Willis v. Aiken*, 8 F.3d 556 (7th Cir. 1993), *Daniels v. Lee*,

316 F.3d 477 (4th Cir. 2003) and *Gunter v. Maloney*, 291 F.3d 74 (1st Cir. 2002),[1] the state courts below reviewed waived federal claims for "plain" or "fundamental" error (depending on the phrasing of the state rules). The federal courts of appeals concluded that review on the merits of a waived federal claim was "independent" of federal law and thus a bar to subsequent *habeas* review. By contrast, in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *Roy v. Coxon*, 907 F.2d 385 (2d Cir. 1990) and *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), the federal appeals courts all held that reviewing a waived federal claim for "plain" or "fundamental" error was "dependent" upon federal law and thus not a bar to subsequent *habeas* review.

Contrary to Respondent's contention, the split has not resulted from varying applications of state rules by the state courts. As the cases cited by Respondent illustrate, the state courts invoked an exception to a waiver rule and reviewed the merits of federal claims for "plain" or "fundamental" error. That pattern does not vary from decision to decision. *See* Petition at 6-11. What varies is the federal appeals courts' conclusions about whether plain-error review is dependent upon the resolution of a federal question. If a state court reviews a federal claim for plain error, five circuit courts would conclude that the ruling is "dependent" upon federal law; six others (including

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[1] The Tenth Circuit's decision in *Guitierrez v. Moriarty*, 922 F.2d 1464 (10th Cir. 1991), pre-dates *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003), which concluded that "[b]ecause the state court denied relief on the merits of the federal claim on plain-error review, procedural bar principles do not apply." Both the Third Circuit and Respondent have erroneously stated that the Tenth Circuit follows the view of the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits that "plain-error" review is independent of federal law. *See* Petition at 10 n.6.

the Third Circuit in this case) hold that the ruling is independent of federal law. Respondent all but concedes that point:

> A state court, conducting plain error review, thus may decide that the particular claim lacks merit under federal law and that there is, perforce, no plain error. The resolution of the state procedural law question in that situation has turned on a federal constitutional ruling, and the state procedural law decision is thus not independent.

Opposition at 8.

Moreover, the split breeds an intolerable inequity, a point Respondent does not bother to address. In this case, Petitioner raised federal claims on appeal to the Delaware Supreme Court that he did not (or could not) raise at trial. On appeal, the Delaware Supreme Court reviewed those claims for "plain error" under Delaware Supreme Court Rule 8. In doing so, the state court reached the merits of the claims. Yet, the district court, and the court of appeals, concluded that a federal *habeas* court could not review those claims because Rule 8's "plain-error" merits review was "independent" of federal law.

If Petitioner had brought his *habeas* petition in a federal district court sitting in New York, Texas, Missouri, Nebraska, Hawaii or Kansas, all of which have state rules similar to Delaware Supreme Court Rule 8,[2] the result would have been different than it was because those district courts sit in circuits that follow a legal rule at odds with the rule the Third Circuit has now adopted.

2. Respondent's remaining contentions either have been addressed in the petition or focus more on the merits of the Third Circuit's decision than

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[2] *See, e.g.*, Petition at 13 n.7.

on the reasons for granting the petition. Because those issues are better addressed in merits briefing after the grant of *certiorari*, Petitioner will only briefly discuss them here.

For example, respondent contends that Delaware Supreme Court Rule 8 is independent of federal law because the state court expressly cited the rule in its opinion. Opposition at 11. But the mere citation of a rule is not enough for the Court to conclude that it is "independent" of federal law, a point addressed on pages 13-14 of the petition.

Respondent also contends that, when the Delaware Supreme Court applies its "plain error" exception, the state court is deciding a question of state law. The federal courts, in turn, are interpreting the state's law, and this Court should not second-guess the federal court of appeals' interpretation. Opposition at 11-12, 14-15. This argument is without merit. First, the Delaware courts have held that "plain error" means federal constitutional errors, as demonstrated on page 16 of the petition. Second, the question in this case is whether a procedural rule with a "plain error" component can preclude *habeas* relief in federal court. Plain error describes the lens through which the state court conducts its examination; the substance of what the state court examines remains, indisputably, federal law. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 375 (2002) (questions of adequacy and independence in *habeas* cases are questions of federal law, not state law).

There is a persistent and intolerable split among the federal courts of appeals with respect to how – and whether – they will review issues presented to state courts under a plain-error standard. That division has current, everyday ramifications, and this Court's review is necessary to bring consistency to this important question of federal law.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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